IN THE

Supreme Court of the United States

October Term, 1976

76-1807

No. .....

STATE, *ex rel* GENUINE PARTS COMPANY
and SENTRY INSURANCE COMPANY

Appellants,

vs.

COURT OF APPEALS OF THE STATE OF NEW MEXICO and THE HONORABLE JOE W. WOOD,

Appellees.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW MEXICO

JURISDICTIONAL STATEMENT

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Appellees.

JUDISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, appellants, Genuine Parts Company and Sentry Insurance Company, file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on direct appeal to review the final judgment in question, and that the Court should exercise such jurisdiction in this case.

OPINIONS BELOW

The Supreme Court of the State of New Mexico entered its judgment denying appellants' petition for a writ of mandamus without rendering an opinion in the matter.

Similarly, the Supreme Court of the State of New Mexico denied appellants' petition for a writ of certiorari without opinion.

This case calls into question the denial of all argument by the Court of Appeals of the State of New Mexico in an opinion by that court in the case of Mary Ann Garcia, plaintiff-appellee v. Genuine Parts Company and Sentry Insurance Company, defendants-appellants. This opinion was reported in 15 N.M. Adv. Sh. 1661, February 3, 1977. Insofar as this opinion constitutes appellants' sole notice of the denial of oral argument on appeal, it is relevant to the issues herein.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from a judgment of the Supreme Court of the State of New Mexico denying appellants' petition for a writ of mandamus. A timely notice of appeal was filed on May 18, 1977, in the Supreme Court of the State of New Mexico. The jurisdiction of this court is invoked under the provisions of Title 28, United States Code, Section 1257(2), whereby the actions of the Court of Appeals of the State of New Mexico have the full force and effect of a statute.

QUESTIONS PRESENTED

1. Whether a denial of oral argument on an appeal of right, without notice, and without authority of either rule or tradition, constitutes a denial of the due process and equal protection clauses of the United States Constitution, amendment fourteen.

2. Whether a client's constitutional right of effective representation by counsel, under the United States Constitution, amendment fourteen, applies in the context of an appeal of right, so as to preclude an unauthorized exclusion of oral argument.

STATEMENT OF THE CASE

The facts of the case underlying this appeal are as follows:

This case arose as a workmen's compensation action in the District Court of New Mexico.[1] There were several issues involved in the action which were ones of first impression involving statutory interpretation of the New Mexico workmen's compensation statue.[2]

Appellants, Genuine Parts Company and Sentry Insurance Company (hereinafter cited as *Genuine*) filed an appeal from the New Mexico District Court judgment pursuant to N.M. Stat. Ann § 16-7-8(B) (1966) in the respondents' court. Both parties to the appeal timely filed requests for oral argument[3] and precluded waiver under N.M. Stat. Ann. § 21-12-18(C) (Supp. 1975) which reads as follows:

> Any party may file written request for oral argument at or before the time of filing his first brief addressed to the merits. In the *absence of such request, oral argument will be deemed waived* and the cause will stand submitted on briefs unless the appellate court shall otherwise direct. (emphasis ours)

Briefs were then filed and both parties awaited notice of the setting for oral argument pursuant to N.M. Stat. Ann. §21-12-18(A) (Supp. 1975). Rather than sending a notice

[1] App. G *infra*.
[2] N.M. Stat. Ann § 59-10-1, *et. seq.* (1953 Comp.).
[3] App. I *infra*.

of hearing as provided for in this rule, the court of appeals delivered its opinion, wherein it was stated: "Oral argument is unnecessary. The judgment is affirmed."[4]

The New Mexico Constitution guarantees an absolute right to one appeal.[5] Pursuant to this article, the legislature provided the procedures by which oral argument would be heard.[6] There is *no rule* authorizing a discretionary denial of oral argument on appeal. The absence of this authorization is of particular note because discretion *is* authorized in the case of motions.[7] In addition, it had been well-settled in tradition and practice that oral argument was to be granted on appeal when requested.[8]

The authority to make such substantial procedural changes rests solely with the Supreme Court of New Mexico,[9] and then only through rule making procedures requiring thirty (30) days notice.[10]. In view of this, *Genuine* sought a rehearing. It was in the petition for rehearing that the federal questions were first raised. A rehearing was denied on January 31, 1977.[11] *Genuine* then filed a petition for certiorari with the Supreme Court of New Mexico. The federal questions involved were raised once again. On March 2, 1977, *Genuine* received notice that this too was denied.[12]

The final state remedy available to *Genuine* was a petition for a writ of mandamus to the Supreme Court of New

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[4] App. F *infra* at p. 29.
[5] N.M. Const. art. 6 § 2.
[6] N.M. Stat. Ann. § 16-2A-1 (Supp. 1975).
[7] N.M. Stat. Ann. § 21-12-18(B) (Supp. 1975).
[8] See App. H *infra*.
[9] N.M. Stat. Ann. § 18-1-1 (1941).
[10] N.M. Stat. Ann. § 21-3-1 (1939).
[11] App. D *infra*.
[12] App. C *infra*.

Mexico. The petition requested the supreme court to issue a writ of mandamus ordering the Honorable Joe W. Wood and the Clerk of the Court of Appeals of the State of New Mexico:

(1) to withdraw an opinion and mandate heretofore filed in the court of appeals, Cause No. 2547;

(2) to accord to petitioners an appeal pursuant to law and take appropriate steps to recall the mandate heretofore issued and reinstate the cause on the docket of the court of appeals; or

(3) to certify said appeal to the Supreme Court of the State of New Mexico.

At the hearing, *Genuine* argued specific violations of both the state and federal constitutions. Pertinent herein, *Genuine* argued:

(1) that the denial of oral argument by the court of appeals, without notice, prescribed procedure or standards was a violation of the due process clause of the fourteenth amendment of the United States Constitution;

(2) that the denial constituted an infringement of *Genuine's* right to full and effective representation by counsel, again in violation of the fourteenth amendment to the United States Constitution, and;

(3) that the denial interfered with the practice of law since counsel relied and had every right to rely on oral argument for the effective advocacy of *Genuine's* position.

The counsel of record for the plaintiff below, Mary Ann Garcia, made an appearance at oral argument and argued against *Genuine's* motion for the writ of mandamus. The

Supreme Court of New Mexico denied the writ without opinion.[13] And the court of appeals has continued to deny oral arguments in the same manner as herein described.[14]

Having no further remedies available within the state judicial system, *Genuine* hereby prays the United States Supreme Court grant this appeal from the final judgment of the Supreme Court of the State of New Mexico.

[13] App. B *infra*.
[14] Peralta v. Martinez, et al., 16 N.M. Adv. Sh. 1820 (May 19, 1977).

SUBSTANTIALITY OF FEDERAL QUESTIONS

1. This appeal presents important and substantial questions, as hereinafter described, in that a decision in this case requires a delicate balancing of the relationship between the dual court system and persons subject to its jurisdiction. Central to the case *sub judice* is that a state court of appeals made an unauthorized diversion from established practice and procedure in violation of the United States Constitution.[1] It is well settled that:

> No change in procedure can be made which disregards those fundamental principles (notice and hearing) ascertained from time to time by judicial action, which relate to process of law, protect the citizen in his private right, and guard him against the arbitrary action of government.[2]

2. The United States Constitution does not demand that a state guarantee an appeal. However, the fourteenth amendment is controlling once an appeal is provided.[3] Whether or not due process calls for an oral argument on appeal is not at issue here. But one issue which is before the Court is whether *notice of the possibility* that oral argument will not be heard is a necessary element of a constitutional appeal.

In this case, notification that oral argument would not be heard was contained in the opinion rendered by the appellees.[4] This is a classic illustration of notice after the fact. An appeal could not be properly effectuated by counsel on the briefs where oral argument was expected and not given

[1] U.S. Const. amend. XIV.
[2] Twining v. New Jersey, 221 U.S. 78 (1908).
[3] U.S. Const. amend. XIV, *construed in* e.g, Griffin v. Illinois, 351 U.S. 12 (1956); *In re* Brown, 439 F.2d 47 (3d Cir. 1971).
[4] App. F *infra* at p. 29.

since the brief will necessarily reflect this expectation. Therefore, petitioner contends that notice was not only a necessary element, but that the denial of this notice was tantamount to a denial of its appeal of right[5] as well as a denial of precedent set by tradition.[6]

3. A second and concurrent factor which this Court is being asked to consider is the constitutionality of this action by the court of appeals where the action is taken without authority and where the rules actually granting authority to another body are abrogated. The Supreme Court of New Mexico is imbued with the exclusive power to change the procedural rules.[7] Since thirty (30) days notice of any change is required, the court of appeals not only acted without authority, but did not even comply with the rule making procedures.[8] This is clearly a violation of the due process guaranteed by the fourteenth amendment.[9] Every citizen is entitled to protection of this federal right. If the state courts will not provide it, the federal courts must. Thus, the question here presented is substantial.[10]

4. As is presented in the second question before this Court, the petitioner's fourteenth amendment right to be fully represented by counsel has also been affected by respondents' actions. A study of case law indicates that this right has been consistently protected at the trial court level in both civil and criminal cases, as well as on appeal in

[5] *Cf.* FCC v. WJR Goodwill Station, Inc., 337 U.S. 265 (1949); Season-all Indus., Inc. v. Turkiye Sis Ve Cam Fabrik, A.S., 425 F.2d 34, 39 (3d Cir. 1970).

[6] See Cohen v. Hurley, 366 U.S. 117 (1961); *cf.* Groendyke Transport, Inc. v. Davis, 406 F.2d 1158, 1162 (5th Cir. 1969).

[7] N.M. Stat. Ann. § 18-1-1 (1941).

[8] N.M. Stat. Ann. § 21-3-1 (1939).

[9] U.S. Const. amend. XIV, *construed in* Twining v. New Jersey *supra* at n.2.

[10] For a further discussion of the substantiality of this question see Conclusion *infra* at p. 10.

criminal cases.[11] Petitioner now asks this Court to hold that the right to full representation by counsel on appeal applies to the state appellate courts in a civil action.

In this case, there were several issues of first impression involving an interpretation of New Mexico's workmen's compensation law.[12] In fact, not one issue decided on this appeal had ever before been addressed by the courts.[13] The effects of this decision were necessarily far reaching and even in other jurisdictions where preclusion of oral argument is provided for by rule, oral argument would not have been denied.[14]

Counsel thus prepared his brief expecting to give oral argument on some of the issues. These two methods were properly integrated to form a non-redundant, effective appeal. By closing off one avenue of persuasion from the court's view, the effectiveness of the efforts of counsel was necessarily diminished and effective representation was thus denied.

> [A] litigant's right to be fully represented by counsel is an integral part of that 'due process of law' which every resident of this . . . nation whose legal rights are being adjudicated can freely invoke.[15]

Indeed, it would be an anomoly to provide this protection in the trial court and to deny it on appeal where the judgment below can be enhanced or expunged. Appellants are, therefore entitled to relief.

[11] *Eg.*, United States v. Walls, 443 F.2d 1220 (6th Cir. 1971); United States *ex rel* Spears v. Johnson, 327 F.Supp. 1021 (E.D. Pa. 1971); see *generally* 38 A.L.R. 2d 1396.

[12] N.M. Stat. Ann. § 59-10-1, *et. seq.* (1953 Comp.)

[13] App. H *infra* at ¶ 9.

[14] See e.g., Southside Bank & Trust Company, et. al. v. Walston & Company, 425 F.2d 40 (7th Cir. 1970).

[15] Nestor v. George, 354 Pa. 19, 46 A.2d 469, 473 (1946).

5. This case provides just one example of what now appears to be a continuing injury. On May 19, 1977, the Honorable Joe Wood once again denied a litigant an oral argument on appeal, but this time the case involved a new definition regarding the time the statute of limitations begins to run in a malpractice suit.[16] The denial of oral argument was once again stated in the last sentence of the opinion. The decision overruling prior definitions was, once again, one of great importance. The seriousness of the violation of due process becomes more pronunced as the court of appeals repeats this unconstitutional action. It is important that this appeal be heard.

CONCLUSION

The petitioners thus pray the Supreme Court of the United States to give effect to the fourteenth amendment under these two theories and preclude unlawful arbitrary actions by a state's court of appeals.

In the last decade, major upheavals have occurred which have obliterated the traditional boundaries of power in the democratic system. The pendulum has begun its swing back once again. The Supreme Court has recognized this and exercised self-restraint time and again in the "due process" decisions of last term.[17] The fourteenth amendment similarly requires that state courts exercise restraint as to persons protected by the United States Constitution. It is the role of the Court today to get the divisions of government back on the traditional paths as defined by the law. The case herein is the perfect vehicle to assist in this task.

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16 Peralta v. Martinez, et al., 16 N.M. Adv. Sh. 1820 (May 19, 1977).

17 See e.g., Paul v. Davis, ... U.S. ....., 96 S.Ct. 1155 (1976); Bishop v. Wood, ... U.S. ....., 96 S.Ct. 2074 (1976).

In the first instance, there are clearly defined issues which lend themselves to valid interpretation as precedent. A state court should be compelled to give notice before substantially interferring with its own procedures,[18] or with the right to full representation by counsel on appeal.

Secondly, each of these issues has been previously settled in other contexts. A decision in this case will form a much needed completion to already set bodies of law.[19]

And finally, review of this case is not only compelled by a sense of justice, but is also centered within the proper province of Supreme Court jurisdiction. As far back as 1923, a similar review was given in *Wagner Electric Manufacturing Co. v. Lyndon.*[20] In that case, petitioners claimed a denial of due process and alleged as error the fact that only a quorum of the judges, rather than the full court, heard oral argument on appeal. The fourth judge made his decision on the briefs. The *Wagner* court under Chief Justice Taft considered this deviation so slight as to be "at most, an irregularity."[21] This leads to the conclusion that if the deviation had been major (such as the total denial of oral argument) a violation of due process would have enured. And this is the same court which held in this same case that a state's denial of the right to a jury trial was not a violation of due process!

The courts are where due process begins. They define it and impose these definitions on other bodies. Truly, they must then afford it as well.

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18 Twining v. New Jersey, supra at n.2.

19 See *generally*, 38 A.L.R.2d 1396 (summary of the law on the right to effective assistance of counsel).

20 262 U.S. 226 (1923).

21 *Id.*, at 232.

For the reasons stated above, appellants submit that this appeal brings before the Court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Dated

Respectfully submitted,

KLECAN & ROACH, P.A.

EUGENE E. KLECAN
505 Marquette NW Suite 1221
Albuquerque, New Mexico 87102
Attorneys for Appellants

APPENDIX A

SUPREME COURT OF
THE STATE OF NEW MEXICO

STATE, ex rel. GENUINE
PARTS COMPANY and SENTRY
INSURANCE COMPANY,

Petitioners,

-vs- No. 11,333

COURT OF APPEALS OF THE
STATE OF NEW MEXICO and
THE HONORABLE JOE W. WOOD,

Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Genuine Parts Company and Sentry Insurance Company, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Mexico, denying a petition for a Writ of Mandamus, entered in this proceeding on March 23, 1977.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph 2.

DATED: May 17, 1977

KLECAN & ROACH, P.A.

s/Eugene E. Klecan

EUGENE E. KLECAN
Attorney for Petitioners
Suite 1221 - 505 Marquette Ave. N.W.
Albuquerque, New Mexico 87102
Telephone: (505) 243-7731, 243-4419

PROOF OF SERVICE:
CERTIFICATE OF SERVICE BY MAIL

I, Eugene E. Klecan, a member of the Bar of the Supreme Court of the United States and counsel of record for Genuine Parts Company and Sentry Insurance Company, appellants herein, hereby certify that on May 17, 1977, pursuant to Rule 33(3)(b), Rules of the Supreme Court, I served three copies of the attached Notice of Appeal and enclosed jurisdictional statement on each of the parties herein as follows:

On Hazel M. Davis as Clerk of the Court of Appeals of the State of New Mexico, appellee herein, by depositing such copies in the United States Post Office, Albuquerque, New Mexico, with first class postage prepaid, properly addressed to the post office address of the Court of Appeals of the State of New Mexico at Santa Fe, New Mexico.

On the Honorable Joe W. Wood, appellee herein, by depositing such copies in the United States Post Office, Albuquerque, New Mexico, with first class postage prepaid, properly addressed to the Honorable Joe W. Wood, Chief Judge, the Court of Appeals for the State of New Mexico, Santa Fe, New Mexico.

On Mary Ann Garcia, a party to the action below, by depositing such copies in the United States Post Office, Albuquerque, New Mexico, with first class postage prepaid, properly addressed to William E. Snead, counsel of record for Mary Ann Garcia at 2001 12th Street N.W., Post Office Box 2226, Albuquerque, New Mexico 87103.

All parties required to be served have been served.

DATED: May 17, 1977

KLECAN & ROACH, P.A.

s/Eugene E. Klecan
EUGENE E. KLECAN
Attorney for Petitioners
Suite 1221 - 505 Marquette Ave. N.W.
Albuquerque, New Mexico 87102
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APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Wednesday, March 23, 1977

No. 11,333

STATE, ex rel GENUINE PARTS COMPANY and SENTRY INSURANCE COMPANY,

Petitioners,

-vs- Original Mandamus Proceeding

COURT OF APPEALS OF THE STATE OF NEW MEXICO, and HON. JOE W. WOOD,

Respondents.

This matter coming on for consideration by the Court upon petition for alternative writ of mandamus, and the Court having considered said petition and being sufficiently advised in the premises:

NOW, THEREFORE, IT IS ORDERED that petition for alternative writ of mandamus be and the same is hereby denied.

ATTEST: A TRUE COPY

ROSE MARIE ALDERETE
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Monday, February 28, 1977

No. 11,293

GENUINE PARTS COMPANY and
SENTRY INSURANCE COMPANY,

Petitioners,

-vs- Original Proceeding on Certiorari

MARY ANN GARCIA,

Respondent.

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari be and the same is hereby denied.

IT IS FURTHER ORDERED that the record in Cause No. 2547 be and the same is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A TRUE COPY

ROSE MARIE ALDERETE
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX D

IN THE COURT OF APPEALS OF
THE STATE OF NEW MEXICO

MARY ANN GARCIA,

Plaintiff-Appellee,

-vs- No. 2547

GENUINE PARTS COMPANY and
SENTRY INSURANCE COMPANY,

Defendants-Appellants.

MOTION FOR RE-HEARING

(Court ruling inserted at end of motion.)

We respectfully request an opportunity to present all of these arguments and request a rehearing on this case because of the errors and the denial of the opportunity to present oral argument.

KLECAN & ROACH, P.A.

EUGENE E. KLECAN
Attorneys for Defendants-Appellants
Suite 1221, 505 Marquette NW
Albuquerque, N.M. 87102
Telephone: 243-7731

I HEREBY CERTIFY that a true
copy of the foregoing was
delivered to opposing counsel
this 28th day of January, 1977.

E. E. KLECAN

THE MOTION FOR REHEARING IS DENIED THIS 31st DAY OF JANUARY, 1977.

JOE W. WOOD
Chief Judge

APPENDIX E

IN THE COURT OF APPEALS OF
THE STATE OF NEW MEXICO

No. 2547

GENUINE PARTS CO., etal,

Appellants,

Bernalillo County
No. 12-74-16772

MARY ANN GARCIA,

Appellee.

MANDATE

(Applicable items are indicated by an "X" below.)

1. . x . . Attached is a true and correct copy of the original decision entered in the above-entitled cause.

2. . x . . This decision being now final, the cause is remanded to you for any further proceedings consistent with said decision.

3. . . . . Writ of Certiorari having been issued by the New Mexico Supreme Court and their decision now being final, this cause is remanded to you for any further proceedings consistent with said Supreme Court decision attached hereto.

4. . . . . You are directed to issue any commitment necessary for the execution of your judgment and sentence.

5. . . . . Cost Bill is assessed as follows:

6. . . . . District Court Clerk's Record returned herewith.

7. . x . . Exhibits filed herein shall be picked up at this Clerk's Office forthwith.

By direction of and in the name of the Chief Judge of the Court of Appeals, this 2nd day of March, 1977.

(SEAL)
cc: Counsel

HAZEL M. DAVIS
Clerk of the Court of Appeals of
the State of New Mexico.

(Tear off and return this receipt)

NO. 2547

RECEIPT IS ACKNOWLEDGED of the original mandate and Clerk's Record.

DATED:

Clerk of the District Court

ATTEST: A true copy.

HAZEL M. DAVIS
Clerk of the Court of Appeals
of the State of New Mexico

APPENDIX F

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MARY ANN GARCIA,
Plaintiff-Appellee,

-v- No. 2547

GENUINE PARTS COMPANY and
SENTRY INSURANCE COMPANY,
Defendants-Appellants.

COURT OF APPEALS OF NEW MEXICO
FILED JANUARY 18, 1977
HAZEL M. DAVIS
Clerk

APPEAL FROM THE DISTRICT COURT
OF BERNALILLO COUNTY
STOWERS, Judge

ARTURO G. ORTEGA, MICHAEL D. BUSTAMANTE
ORTEGA, SNEAD and DIXON
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Attorneys for Appellee,

JAMES T. ROACH
KLECAN & ROACH, P.A.
Albuquerque, New Mexico
Attorneys for Appellants.

OPINION

WOOD, Chief Judge.

Defendants appeal the judgment in favor of plaintiff in this workmen's compensation case. The issues raised

group into two categories: (1) proof of disability, and (2) basis for liability for medical expenses.

Plaintiff was accidentally injured while at work on December 31, 1973. She filed a complaint seeking workmen's compensation benefits in December, 1974. The case was tried in January, 1976. The transcript on appeal was filed in this Court on August 6, 1976; briefing was completed on November 29, 1976. See §§59-10-13.10(A) and 59-10-16.1, N.M.S.A. 1953 (2d Repl. Vol. 9, pt. 1) concerning the advancement of workmen's compensation cases on court calendars.

There is evidence that a heavy box fell on a co-worker's foot; that upon lifting the box, plaintiff felt a sharp pain in her back that went down into her legs. This was immediately reported to plaintiff's manager who inquired whether plaintiff wished to continue working or wanted to go home. There is evidence that plaintiff continued working, but with increasing pain. During her luncheon time, on the day of the accident, plaintiff went to the emergency room of a hospital where she was told not to return to work for three days and to avoid heavy lifting on her return. Plaintiff was seen by Dr. Cornish on January 24 and February 28, 1974; Dr. Cornish diagnosed a muscle strain.

Plaintiff was seen by Dr. Hollinger on January 29 and February 11, 1974. Up until April, 1974 she was being seen by a chiropractor. She returned to Dr. Hollinger in August, 1974 with increased complaints and has remained under his care. This care included a laminectomy in October, 1974 and a laminectomy and fusion in February, 1975. There is evidence that the fusion was a "non-union" and that an additional surgical procedure is necessary.

Proof of Disability

The trial court found that plaintiff was totally disabled at the time of trial and had been since the accident on De-

cember 31, 1973. Defendants raise three issues in connection with this finding.

Two of the issues are based on the testimony of defendants' medical witness, Dr. Parnall, who disagreed with Dr. Hollinger as to the need for Dr. Hollinger's surgical procedures. Defendants claim they cannot be held liable for aggravation of plaintiff's condition caused by unskillful medical treatment by a physician chosen by plaintiff. Defendants also claim an absence of substantial evidence to support an award of total disability in that any disability was caused by negligence of physicians chosen by plaintiff. Both contentions are directed to Dr. Hollinger's treatment; we assume, but do not decide, that Dr. Hollinger was selected by plaintiff.

These two issues are based on claims of unskillful medical treatment and negligence on the part of Dr. Hollinger. Evidentiary support for these claims is necessarily based on Dr. Parnall's testimony. Assuming, but not deciding, that Dr. Parnall's testimony provides such support, we have a conflict in the evidence; the medical experts were in disagreement.

Defendants recognize that this conflict exists. They contend we should not decide these two issues on the basis of substantial evidence. Although the trial court found that Dr. Hollinger's treatment was necessary, defendants would have us disregard this finding. In essence, defendants ask us to weigh the evidence, determine that Dr. Hollinger was not to be believed and hold that the facts are those inferable from Dr. Parnall's testimony.

We do not weigh the evidence on appeal; rather we view the evidence in the light most favorable to support the findings of the trial court. Duran v. New Jersey Zinc Company, 83 N.M. 38, 487 P.2d 1343 (1971). There is substantial evidence that Dr. Hollinger's treatment was necessary and that plaintiff's disability resulted from the accident of December 31, 1973.

A third issue under this point is that there is no proof of disability between February 11, 1974 and August 23, 1974. During this period plaintiff was not seen by Dr. Hollinger. The evidence is that during this period of time, plaintiff visited a chiropractor and may have been treated in the emergency room of a hospital. The chiropractor did not testify; there is no medical evidence concerning emergency room treatment, if any. For this period of time Dr. Hollinger testified: "I would not really be able to state whether or not she could work."

Defendants state: "Dr. Hollinger admitted that there was no medical probability that . . . [plaintiff] was disabled" during the period in question. They assert that §59-10-13.3(B), N.M.S.A. 1953 (2d Repl. Vol. 9, pt. 1) precludes an award of compensation for this period.

Defendants misconstrue Dr. Hollinger's testimony. The quoted testimony went only to an inability to testify as to working ability during the period in question; it did not go to whether disability did or did not exist during this period. Compare, Mares v. City of Clovis, 79 N.M. 759, 449 P.2d 667 (Ct.App. 1968). Other testimony of Dr. Hollinger was to the effect that plaintiff was continuously disabled to some extent after the injury occurred. Dr. Parnall testified there was some interference with plaintiff's work due to the injury, but he could not say how long this "lame back" would have lasted if surgery had not been done. The first surgery was performed subsequent to the time period in question.

Section 59-10-13.3(B), supra, reads:

> "B. In all cases where the defendants deny that an alleged disability is a natural and direct result of the accident, the workman must establish that causal connection as a medical probability by expert medical testimony. No award of compensation shall be based on speculation or on expert testimony that as a medical possibility the causal connection exists."

This section requires the causal connection between the disability and the accident be established as a medical probability by expert medical testimony. Both Dr. Hollinger's and Dr. Parnall's testimony met this requirement. See Gammon v. Ebasco Corporation, 74 N.M. 789, 399 P.2d 279 (1965).

Neither physician testified as to the extent of plaintiff's disability during the period in question. Section 59-10-13.3(B), supra, does not require that the extent of the disability be established as a medical probability by expert medical testimony. "Disability" is defined in terms of ability to perform work and requires consideration of the claimant's age, education, training, physical capacity, mental capacity and work experience. Sections 59-10-12.18 and 12.19, N.M.S.A. 1953 (2d Repl. Vol. 9, pt. 1). By statutory definition, more than physical condition is involved in determining "disability". See Goolsby v. Pucci Distributing Company, 80 N.M. 59, 451 P.2d 308 (Ct.App. 1969).

Once causation is established by appropriate medical evidence, the absence of medical testimony as to the *extent of disability* does not bar a disability award. The extent of disability may be established by the plaintiff. See Seay v. Lea County Sand and Gravel Company, 60 N.M. 399, 292 P.2d 93 (1956). Plaintiff's testimony was substantial evidence supporting the award of total disability during the period in question.

Basis for Liability for Medical Expenses

The medical bills were substantial. The trial court found the bills were reasonable in amount and were incurred in the necessary treatment of plaintiff. It also found that additional medical and hospital care would be required in the future, and that plaintiff was entitled to be paid for reasonable future expenses. Defendants raise two issues in connection with these findings.

The first issue goes to the sufficiency of the evidence

to support the findings. They concede that Dr. Hollinger testified that the bills were reasonable in amount and that the treatment reflected by the bills was necessary. Because the trial court adopted plaintiff's requested findings, defendants urge a "more stringent mode of review". Again, defendants are asking this Court to weigh the evidence, to disregard Dr. Hollinger's testimony and to accept Dr. Parnall's testimony. We are not fact finders, but a court of review. The trial court resolved the evidentiary conflicts. It is not our function to weigh the evidence, but to determine whether substantial evidence supports the challenged findings. Duran v. New Jersey Zinc Company, supra. The findings are supported by substantial evidence.

The second issue goes to the basis for holding defendant liable for the medical bills, and involves the meaning of §59-10-19.1, N.M.S.A. 1953 (2d Repl. Vol. 9, pt. 1). The pertinent portion of that section reads:

> "A. After injury, and continuing as long as medical or surgical attention is reasonably necessary, the employer shall furnish all reasonable surgical, physical rehabilitation services, medical, osteopathic, chiropractic, dental, optometry and hospital services and medicine, not to exceed the sum of forty thousand dollars ($40,000), unless the workman refuses to allow them to be so furnished.
>
> "B. In case the employer has made provisions for, and has at the service of the workman at the time of the accident, adequate surgical, hospital and medical facilities and attention and offers to furnish these services during the period necessary, then the employer shall be under no obligation to furnish additional surgical, medical or hospital services or medicine than those so provided . . . ."

Language similar to that appearing in Paragraph A of §59-10-19.1, supra, was interpreted in Johnson v. Armstrong

& Armstrong, 41 N.M. 206, 66 P.2d 992 (1937). *Johnson* states that the language in Paragraph A:

> "imports more than a mere passive willingness or duty to furnish medical and surgical aid when called upon. It allows the employer to select his own physicians and surgeons for the care of his injured employees, but imports that arrangements should be made in advance, or that some one should be at hand in authority to provide medical and surgical care in cases of emergency like the one here considered. Case of Ripley, 229 Mass. 302, 118 N.E. 638; In re Panasuk (In re American, etc., Co.), 217 Mass. 589, 105 N.E. 368."

The two Massachusetts cases cited in *Johnson*, supra, elucidate. In Re Panasuk, 217 Mass. 589, 105 N.E. 368 (1914) states that the obligation to provide medical services is imposed by the express words of the statute:

> "This duty must be performed or reasonable efforts made to that end before the statutory obligation is satisfied. . . . The word 'furnish' in such connection imports something more than a passive willingness to respond to a demand. It implies some degree of active effort to bring to the injured person the required humanitarian relief."

In re Ripley, 229 Mass. 302, 118 N.E. 638 (1918) affirmed the foregoing quotation from *Panasuk*, supra.

2 Larson's Workmen's Compensation Law, §61.12, p. 10-453, states:

> "[T]he first issue that sometimes comes into litigation is the question whether the initiative lies with the employee to apply for medical benefits, or with the employer to call attention to their availability and furnish them without being asked. It is usually held that, when the employee has furnished the employer with the facts of his injury, it is up to the employer to instruct the employee on what to do to obtain medical attention, and to inform him regarding the medical and surgical aid to be furnished."

See Draney v. Industrial Accident Commission, 95 Cal.App. 2d 64, 212 P.2d 49 (1949); Teague v. Graining Hardwood Manufacturing Co., 238 Miss. 48, 117 So.2d 342 (1960); Compare Cross v. Wichita Compressed Steel Company, 187 Kan. 344, 356 P.2d 804 (1960).

The evidence is uncontradicted that defendants made no active effort to provide medical attention. When plaintiff reported the accident and her back and leg pain to her manager, the only inquiry was whether plaintiff wanted to continue working or go home. The manager never mentioned medical attention. Plaintiff went to the hospital emergency room on her own initiative. She went to see Dr. Cornish either on the recommendation of some one in the emergency room or because he had previously treated her for an unrelated illness; the evidence supports either view.

However, there is no issue in this appeal concerning the emergency room charge on the date of the accident or Dr. Cornish's bill. Defendants assert that they paid these bills. The trial court refused to so find, and properly under the record which is before us, because the deposition on which defendants rely has not been included in the record on appeal. However, we will assume that defendants did pay these bills.

Defendants claim they are not liable for the bills incurred in connection with Dr. Hollinger's treatment. These are the bills for which plaintiff recovered judgment. Defendants assert they are not liable for these bills under Paragraph B of §59-10-19.1, supra. On the basis that they paid the emergency room charge and Dr. Cornish's bill, they assert that they were furnishing adequate medical attention and therefore are not liable to furnish additional medical services. They point out that plaintiff never requested them to provide additional medical services, never asserted that Dr.

Cornish's services were inadequate, failed to keep an appointment with Dr. Cornish and on the day of the unkept appointment, went to Dr. Hollinger on her own initiative. They rely on cases where the employer was providing medical services. See, for example: Dudley v. Ferguson Trucking Company, 61 N.M. 166, 297 P.2d 313 (1956); Provencio v. New Jersey Zinc Co., 86 N.M. 538, 525 P.2d 898 (Ct.App. 1974) and cases cited in *Provencio*.

We have assumed that defendants paid the emergency room charge and Dr. Cornish's bill. Does this assumption require a conclusion that defendants were furnishing medical services to plaintiff? No. There is nothing in this record showing when the bills were paid; we note that Dr. Cornish's report to the insurance company was written more than ten months after the date of his examination. Plaintiff testified that she did not know who paid these bills; she never knew that defendants were willing to provide medical treatment; she selected the physicians that did in fact treat her. The facts here do not show that defendants undertook their obligations to pay plaintiff's medical expenses. See Security Insurance Co. of Hartford v. Chapman, 88 N.M. 292, 540 P.2d 222 (1975).

Defendants' position is that they had no obligation other than to respond to requests for medical attention. We have pointed out that "furnish" in Paragraph A of §59-10-19.1, supra, requires more than a passive willingness to respond to a demand. Paragraph B of the statute requires an "offer to furnish" medical services to avoid liability for the services procured by plaintiff. "Furnish" in Paragraph B also requires more than a passive willingness to respond to a demand.

Before defendants can avoid liability under Paragraph B of §59-10-19.1, supra, they must have provided medical services or they must have affirmatively offered the services. Assuming defendants did in fact pay two medical bills incurred by plaintiff on her own initiative, this assumption shows no more than a passive willingness to respond. See

McCoy v. Industrial Accident Commission, 48 Cal.Rptr. 858, 410 P.2d 362 (1966). Not having offered medical services, §59-10-19.1(B), supra, is not applicable. Dudley v. Ferguson Trucking Company and the rules discussed in Provencio v. New Jersey Zinc Co., supra, are also inapplicable. Defendants are liable for the medical services which plaintiff procured.

Oral argument is unnecessary. The judgment is affirmed. Having considered the issues litigated on appeal and the time necessarily expended in responding to defendants' contentions, plaintiff is awarded $3,000.00 for the services of her attorneys in the appeal.

IT IS SO ORDERED.

JOE W. WOOD
Chief Judge

WE CONCUR:

WILLIAM R. HENDLEY, J.
LEWIS R. SUTIN, J.

STATE OF
NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

MARY ANN GARCIA,

Plaintiff,

-vs- No. 12-74-16772

GENUINE PARTS COMPANY, et al,

Defendants.

JUDGMENT

THIS CAUSE having come on for trial on the merits before the Court, plaintiff appearing personally, and by and through her counsel, ORTEGA, SNEAD, DIXON AND HANNA, by Arturo G. Ortega, defendants appearing by and through their attorneys of record, the law firm of KLECAN & ROACH, P.A., by Eugene E. Klecan and John A. Klecan, and the Court after hearing the testimony of the witnesses, considering all material marked into evidence, hearing the arguments of counsel, and considering the authorities submitted to it, having found the issues herein in favor of plaintiff and having made and filed its Findings of Fact and Conclusions of Law favorable to plaintiff, and pursuant to which,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The plaintiff be, and she hereby is, declared totally and permanently disabled within the meaning of the Workmen's Compensation Act of the State of New Mexico.

2. The defendants be, and they hereby are, ordered to pay plaintiff the maximum benefits provided by that Act, which pursuant to the Court's Findings of Fact and Conclusions of Law, are hereby decreed to be $65.00 dollars per week, in the following manner, to-wit:

a. Past and accrued compensation benefits from the date of the injury sustained by plaintiff on December 31, 1973, to the date of the entry of judgment herein shall be paid in a lump sum equal to the number of weeks described herein times Sixty Five Dollars ($65.00).

b. Weekly compensation benefits shall be paid at the rate of Sixty Five Dollars ($65.00) per week from the date of entry of judgment herein until further order of the Court, but in no event to exceed a period of five hundred weeks from the date of plaintiff's accident.

3. That the defendant be, and they hereby are, ordered to pay the following medical and hospitalization expenses incurred by plaintiff to the date of trial:

Albuquerque Anesthesia Services, Ltd.	$ 166.40
Eugene W. Wasylenki, M.D.	189.28
Albuquerque Prosthetic Center	140.00
Joseph Hollinger, M.D.	2,910.05
Albuquerque Anesthesia Services, Ltd.	239.20
B. Ruppe Drugstore	112.32
Miscellaneous Prescriptions	106.58
Presbyterian Hospital Center	4,916.82
Prescriptions - Furr's Pharmacy	65.78

4. That defendants be, and they hereby are, ordered to pay plaintiff future medical expenses which may be incurred and may be necessary in the future for the treatment of residual injuries and disabilities naturally and directly arising from the accidental injury suffered by plaintiff on December 31, 1973, all in accordance with the New Mexico Workmen's Compensation Act.

5. That the defendants be, and they hereby are, ordered to pay plaintiff's attorneys the sum of Three Thousand Five Hundred Dollars ($3,500.00) as and for their services rendered herein.

6. That defendants be, and they hereby are, ordered to pay plaintiff's costs herein as they may hereinafter be assessed by the Court.

DISTRICT JUDGE

SUBMITTED AS TO FORM:

MICHAEL D. BUSTAMANTE
Of Counsel for Plaintiff

Of Counsel for Defendants

APPENDIX H

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1976

No. .....

STATE *ex rel* GENUINE PARTS COMPANY and SENTRY INSURANCE COMPANY,

Appellants,

-vs-

COURT OF APPEALS OF THE STATE OF NEW MEXICO and THE HONORABLE JOE W. WOOD,

Appellees.

ATTORNEY'S CERTIFICATE

COMES NOW EUGENE E. KLECAN and states as follows:

1. I am a member in good standing of the both the bars of the State of New Mexico and the United States Supreme Court.

2. I have been engaged in the practice of law since 1954; a total of 23 years.

3. In that time, I recall no appellate case in the Supreme Court of New Mexico where I did not have an oral argument. To my recollection all supreme court cases had an oral argument unless both parties agreed to submit the matter on

brief. Oral argument was a traditional right recognized as such by all the bench and bar.

4. Until 1967 the Supreme Court of New Mexico was the sole appellate court. Since then we have had two appellate tribunals with many appeals still going directly to the supreme court.

5. I have had numerous appeals in both appellate tribunals since the creation of the court of appeals, and never did I fail to have an oral argument on any case. There was one recent exception on November 30, 1976, when the court of appeals affirmed our case without granting an oral argument even though requested. No basis for not allowing oral argument was stated.

6. Other cases during the year 1976-1977 have allowed oral arguments and there is no distinction made in any way as to why oral argument was allowed in one case and denied in another.

7. I believe the Rules of Appellant Procedure provide for an oral argument on an appeal. Section 16-2H-1(b) states: "Settings for oral argument *will* be fixed by the court and notice thereof given to counsel." I was awaiting this notice of oral argument from the clerk's office of the court of appeal since all parties had "requested" oral arguments.

The Rules of Appellate Procedure were fixed by the Supreme Court which rule making power is not possessed nor shared in by our intermediate court of appeals.

Since the issue of "due process" was raised in the appellate tribunals of New Mexico, in this case, the court of appeals also denied the right of oral argument without any stated reason. (We did not participate in that case.) The practice of law in New Mexico continues then to function, as to oral argument, at the whim of the New Mexico Court of Appeals.

8. Since some are allowed oral argument and others denied it, without any governing principle it is also in violation of the equal protection of the laws provision of the fourteenth amendment of the United States Constitution.

I believe that a constitutional right is *per se* a right which resides in the private citizen even though its protection needs the aid of the judiciary. I believe under these circumstances that the right of oral argument, not in the abstract and universal sense, but in the concrete setting of this denial with all of its attending circumstances of law and tradition and lack of notice, is a denial of a constitutional right. It does not exist at the discretion of the government in any of its functioning powers. I sincerely believe that oral argument was a vital step in a complete presentation of my client's legal position in this case.

9. This appeal raised original questions for review as even the appellee's brief admits. It cannot be considered a repetitious type of appeal. The opinion neglected to even treat one major new issue raised in the brief.

Eugene E. Klecan
Suite 1221 - 505 Marquette, N.W.
Albuquerque, New Mexico 87101

COURT OF APPEALS OF NEW MEXICO

REQUEST FOR ORAL ARGUMENT

MARY ANN GARCIA,

Plaintiff-Appellee,

-v- No. 2547

GENUINE PARTS CO., et al.

Defendants-Appellants.

The undersigned counsel for Genuine Parts Co., et al in the above entitled cause hereby requests that the same be set down for oral argument.

Eugene E. Klecan
Counsel for Appellants

CONSTITUTION AND STATUTES OF THE STATE OF NEW MEXICO

NEW MEXICO CONSTITUTION

Art. VI, §2

Sec. 2. [Supreme Court's appellate jurisdiction.]

Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction as may be provided by law; provided that an aggrieved party shall have an absolute right to one appeal. (As amended September 28, 1965.)

NEW MEXICO STATUTES

16-2A-1. Rule 1—Terms, sessions and hearings.

(a) The Supreme Court shall hold one term each year, commencing on the second Wednesday in January, and shall be at all times in session at the seat of government; provided that the court may, from time to time, take such recess as in its judgment may be proper. (N.M. Const., art. VI, §7.)

(b) Settings for oral argument will be fixed by the court and notice thereof given to counsel.

(c) Except as otherwise specifically ordered, a session will be held on the Wednesday after the first Monday of each Month for hearing motions. All motions as to which the time for filing briefs has expired will be heard on such motion days or be deemed submitted on briefs.

(d) Either party, at or before the filing of his first brief on the merits, may file written request for oral argument. In the absence of such request, oral argument will be

deemed waived, and the cause will stand submitted on the briefs unless the court shall otherwise direct.

(e) The court will order oral arguments, without application therefor, in such cases as it deems such arguments essential.

(f) Two or more cases involving the same question may be heard together, by leave of the court.

(g) Criminal cases and cases involving matters of general public interest or policy may be advanced for oral argument or decision by leave of the court and upon the motion of either party.

(h) Oral arguments of twenty minutes will be allowed each side on motions and of thirty minutes on each side on all other matters, unless the time shall be extended or abridged by the court.

(i) Unless otherwise ordered, the appellant or plaintiff in error shall open and close the argument.

(j) If any cause shall not be decided during the term at or during which it was argued or submitted, it shall stand and be deemed continued from term to term until disposed of. Judgment shall be entered on the filing of a written opinion concurred in by a majority of the justices.

(k) Whenever the justices before whom a law question has been heard, shall so desire, others of the justices may be called in to take part in the decision, upon a perusal of the record and briefs, without a formal reargument, unless one of the parties make objection at the argument.

16-7-8. Court of appeals — Appellate jurisdiction — The appellate jurisdiction of the court of appeals is coextensive with the state, and the court has jurisdiction to review on appeal.

B. all actions under the Workmen's Compensation Act [59-10-1 to 59-10-37], the New Mexico Occupational Disease Disablement Law [59-11-1 to 59-11-42], the Subsequent Injury Act [59-10-126 to 59-10-138] and the Federal Employers' Act;

18-1-1. Rules defining and regulating practice of law — Authority of Supreme Court — Distribution — Effective date.— The Supreme Court of the state of New Mexico shall, by rules promulgated from time to time, define and regulate the practice of law within the state of New Mexico. The Supreme Court shall cause such rules to be printed and distributed to all members of the bar, to applicants for admission, and to all courts within the state of New Mexico and the same shall not become effective until thirty (30) days after the same shall have been made ready for distribution and so distributed.

21-3-1. Rules of pleading, practice and procedure. — A. The Supreme Court of New Mexico shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts of New Mexico for the purpose of simplifying and promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant.

B. The Supreme Court shall cause all rules to be printed and distributed to all members of the bar of the state and to all applicants, and no rule shall become effective until thirty (30) days after it has been so printed and distributed.

21-12-18. Rule 18 — Oral argument.

(a) Settings. Settings for oral argument will be fixed by the appellate court and notice thereof given by the clerk.

(b) Motions. Motions will be decided on briefs, without oral arguments, unless the appellate court, in its discretion, determines otherwise, either on its own motion or on written request of a party.

(c) Request for Oral Argument. Any party may file written request for oral argument at or before the time of filing his first brief addressed to the merits. In the absence of any such request, oral argument will be deemed waived and the cause will stand submitted on briefs unless the appellate court shall otherwise direct.

(d) Order of Argument. Unless otherwise ordered, the party first filing notice of appeal shall open and close the argument. A cross appeal shall be argued with the initial appeal unless the appellate court otherwise directs.

(e) Time for Argument. Oral argument of twenty minutes will be allowed to each side on motions and of thirty minutes on each side as to all other matters unless the time be extended or abridged by the appellate court. A party desiring additional time for argument may make appropriate written request by letter addressed to the clerk a reasonable time in advance of the date set for argument.

(f) Joint Argument. Two or more cases involving the same or related questions may be heard together by leave of the appellate court.

(g) Reargument. Reargument shall not be required to enable a justice or judge who did not heard the original argument to participate in the decision of any cause.

59-10-1. Short title. — This act, sections 59-10-1 through 59-10-37, New Mexico Statutes Annotated, 1953 Compilation, shall be known as the "Workmen's Compensation Act."